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In the Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that, under the Equal Access Act, 20 U.S.C. 4071-4074 (Supp. V 1987), Westside High School has a "limited open forum," and thus must provide its students "equal access" to school facilities for religious speech.

2. Whether the Act, so construed, violates the Establishment Clause.

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Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 14, 19, 41

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Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1979) 43

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McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1 31

National Center for Education Statistics, U.S. Dep't of Education, *Public Elementary and Secondary School Revenues and Current Expenditures Fiscal Year 1987: Final Tabulations; and Fiscal Year 1986: Revised Final Tabulations* (1988) 26

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 867 F.2d 1076. The opinion of the district court (Pet. App. B1-B30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1989. The petition for a writ of certiorari was filed on March 30, 1989, and was granted on July 3, 1989. This Court's jurisdiction rests on 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V 1987) [1] is reproduced as an appendix, *infra*, 1a-2a.

[1] All citations of the Act are to the Fifth Supplement (1987) of the United States Code.

STATEMENT

1. The Equal Access Act prohibits any public secondary school that receives federal financial assistance and maintains a "limited open forum" from discriminating against students who wish to conduct a meeting within that forum because of the content of their speech. 20 U.S.C. 4071(a).[2] A "limited open forum" exists under the Act whenever a school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b). Although the Act does not define the phrase "noncurriculum related student groups," it does define the term "meeting" to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school's curriculum." 20 U.S.C. 4072(3).

Under the Act, a school provides "equal access" to a limited open forum if the school uniformly provides that meetings within the forum are voluntary and student-initiated; are not sponsored by the school, the government, its agents or employees; and are not directed, conducted, controlled, or regularly attended by outsiders. 20 U.S.C. 4071(c)(1), (2), and (5). The Act also reserves school authority to limit access as necessary for the orderly conduct of educational activities within the school (20 U.S.C. 4071(c)(4)), and as needed in order to maintain discipline, to guard the well-being of students and faculty, and to assure that attendance at all meetings is voluntary (20 U.S.C. 4071(f)).

In addition, the Act establishes rules that limit government conduct where religious speech is concerned.

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[2] Section 4071(a) provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Agents or employees of the government may attend religious meetings only in a "nonparticipatory" capacity. 20 U.S.C. 4071(c)(3). Moreover, a State cannot influence the form of any religious activity, cannot require any person to participate in such activity, and cannot compel any school agent or employee to attend a meeting if the content of speech at the meeting is contrary to that person's own beliefs. 20 U.S.C. 4071(d)(1), (2), and (4). Nor can a State apply the Act in violation of the constitutional rights of any person. 20 U.S.C. 4071(d)(7).

The Act does not include any express enforcement mechanism and explicitly states that it does not "authorize the United States to deny or withhold Federal financial assistance to any school." 20 U.S.C. 4071(e). The Act has been construed, however, to create implied private rights of action for declaratory and injunctive relief. *Student Coalition for Peace* v. *Lower Merion School Dist.*, 776 F.2d 431, 438-441 (3d Cir. 1985).

2. Respondents include present and former students at Westside High School (Westside or WHS) in Omaha, Nebraska.[3] At Westside, there are approximately 30 different student groups or clubs that meet after school hours in school facilities. J.A. 60. Students participate in these club activities on a voluntary basis. Pet. App. A4-A5. Student clubs may be initiated by students or faculty members, and are approved by the school. J.A. 230-231, 240-241, 290-291, 358-359. Although there are no written selection criteria, school administrators state that they approve those student activities that they believe are consistent with the "Mission & Goals" of the school district and with school board policy. See J.A. 220-221, 242, 299, 304.

The "Mission & Goals" statement of the Westside Community Schools is a broadly worded "blueprint" that records the schools' commitment to teaching academic, physical, civic, and personal skills and values. See J.A. 473-478. School Board policy is reflected in a number of

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[3] Westside received federal financial assistance at all relevant times. J.A. 58.

documents. Most notably, School Board Policy 5610 on "Student Clubs and Organizations" reiterates the Board's commitment to developing "citizenship, wholesome attitudes, good human relations, knowledge and skills." J.A. 488. In addition, Policy 5610 provides that "[s]chool-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship." *Ibid.* All Westside clubs currently do have faculty sponsors. J.A. 60.

Also pertinent is School Board Policy 6180 on "Recognition of Religious Beliefs and Customs." J.A. 462, 350-352. That policy requires that "[s]tudents adhering to a specific set of religious beliefs or holding to little or no belief shall be alike respected." J.A. 462. In addition, in School Board Policy 5450, the Board recognizes its students' "Freedom of Expression," consistent with the full authority of the Board. J.A. 489.

In January 1985, respondent Bridget Mergens requested permission to form a club for religious fellowship at Westside. The proposed club would be identical in its terms and conditions to other Westside student clubs, except that the proposed club would not have a school sponsor. J.A. 59. According to the students' testimony at trial, the club's purpose would have been, among other things, to allow the students to have fellowship, to read and discuss the Bible, and to pray together. J.A. 72, 116, 143, 163, 181. Membership would have been voluntary and open to all students regardless of religious affiliation. J.A. 102, 144.

Westside's Principal, petitioner James E. Findley, denied Mergens' request for permission to form a religious club. He later reaffirmed that denial after conferring with the Associate Superintendent of Schools (petitioner James A. Tangdall) and the Superintendent of Schools (petitioner Kenneth K. Hansen). J.A. 59. According to their testimony at trial, these officials agreed that Mergens' request for a religious club had to be denied because school policy required that student clubs have a sponsor, which the religious club would not or could not

have,[4] and because a religious club at the school would violate the Establishment Clause. J.A. 80-81, 111, 244-246, 312-313, 345-352.

Mergens appealed the denial of access to the Westside Board of Education. The Board unanimously voted to uphold the denial. J.A. 22.

3. The student respondents then brought this suit in the United States District Court for the District of Nebraska. They asserted that the actions of the Westside School Board and Westside school officials violated the Equal Access Act, 20 U.S.C. 4071-4074, and infringed their rights to free speech, the free exercise of religion and nonestablishment, and the freedoms of assembly and association guaranteed them by the First and Fourteenth Amendments. See J.A. 26-32.[5] The United States intervened in the action pursuant to 28 U.S.C. 2403 to defend the constitutionality of the Act.

In a bench trial, the student respondents maintained that Westside High School maintained an "open forum," in both the statutory and constitutional sense, from which they had been discriminatorily excluded because of the religious content of their speech. The students identified ten student clubs at Westside as "noncurriculum related" for purposes of the Equal Access Act. Those clubs included a chess club, Subsurfers (a scuba diving club), the photography club, and Interact and Zonta (two service clubs affiliated respectively with Rotary International and Zonta International).[6] J.A. 60. Through their own

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[4] Petitioner Findley testified that he believed the Equal Access Act would prohibit the school from appointing a sponsor for the religious club. J.A. 244.

[5] Among other claims, the students also asserted that petitioners' actions violated Article I of the Nebraska Constitution, and the Civil Rights Act, 42 U.S.C. 1983. J.A. 29-30.

[6] The other clubs or activities included the National Honor Society, Welcome to Westside, Future Business Leaders of America, Student Advisory Board, and Student Forum. J.A. 60. The students specified that their list of ten was not intended to be an exhaustive list of the noncurriculum related student clubs at Westside. *Ibid.*

testimony (see, *e.g.*, J.A. 92, 167-168, 182-183, 190-191, 197-199, 212-214), the testimony of school officials (see, *e.g.*, J.A. 220-224, 231-233, 300-306), and the testimony of an expert witness (J.A. 400-418), the students sought to prove that none of these clubs had a direct connection to any class at Westside.

The students also challenged the school's "sponsorship" policy as one in name only, asserting that faculty sponsors frequently functioned only as monitors.[7] Finally, the students testified to their ability to differentiate an equal access policy from school endorsement or sponsorship of religious speech occurring within a student club. J.A. 189, 212, 215. To support their testimony in this regard, the students called an expert witness who testified that Westside students could perceive content-based exclusion of religious clubs as state hostility toward religion, but would be unlikely to mistake equal access as official endorsement of a club's religious speech. J.A. 396-400.

For their part, petitioners argued that, notwithstanding the substantial number of student organizations, Westside had not created a "limited open forum" for student clubs because Policy 5610 requires all student clubs to be school sponsored and because none of the many organizations and clubs allowed to meet is noncurriculum related. With respect to school sponsorship, school officials testified that the school requires sponsors to be actively involved in directing each club and in ensuring that each student activity includes a balanced presentation of issues. J.A. 245-248, 250-251, 255, 273-274, 286. With respect to whether any student clubs at Westside are "noncurriculum related," school officials sought to explain how each club is related to a specific class at Westside or furthers the school's "mission and goals" in some other way. See, *e.g.*, J.A. 220-238, 319-321, 442-449.

[7] See, *e.g.*, J.A. 92-93 (Drama club), 111-112 (general description); cf. J.A. 182-183 (Computer club), 167 (Subsurfers), 214-215 (role of sponsor of Future Business Leaders of America limited to discipline and fundraising). According to school officials, sponsors "would be actively involved at one point" (J.A. 239, 250-251), but would have differing amounts of involvement thereafter (J.A. 260).

School officials also testified that, in their professional judgment, Westside students are sufficiently impressionable that they might mistake equal access for a religious club as school endorsement of the club's religious speech in violation of the Establishment Clause. J.A. 282, 424-425, 435-438.[8]

4. The district court entered judgment for petitioners. Pet. App. B1-B30. It held, first, that the Equal Access Act is inapplicable in this case because Westside High School has no "noncurriculum related" clubs. All Westside clubs, the district court concluded, were "curriculum related and tied to the educational function of the institution." Pet. App. B25-B26.[9]

The district court next held that the students had not proved their claim under the First Amendment because Westside's denial of access to the proposed club was " 'reasonably related to legitimate pedagogical concerns'." Pet. App. B27, B28 (quoting *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988)).[10] As articulated by

[8] School officials noted that the students could discuss the Bible informally at school before, during, and after school hours and that the students probably could have met on their own for that purpose if they had not requested permission to form a club. J.A. 315-316, 371-373, 430-431, 438-440. When asked to elaborate on this point, however, the school officials stated that they would have prohibited the students from meeting to discuss religious topics if the meetings were to be "regular" or "planned" (J.A. 373-374, 452), or if the students wanted to make their meetings known to other students or invite others to the meetings (J.A. 431-433). The students requested permission for a religious club because they desired "regular," "planned" meetings and because they did not want to "sneak[] around behind the administration's back." J.A. 112-114.

[9] The district court thus found it unnecessary to reach the issue of the Act's constitutionality, although it did conclude that Westside students were no more likely to mistake equal access for religious speech as school sponsorship of religion in the context of Westside's student club program than were the university students in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Pet. App. B11-B12 n.1.

[10] The district court applied this standard because it found that Westside had not created a "limited open forum" for student clubs

Westside administrators, those concerns involved "the school's goal of presenting a balanced view when political, religious and economic information is dispensed within WHS facilities" (Pet. App. B28), concerns which the administrators assumed a religious club could not meet (J.A. 255, 313).

The United States Court of Appeals for the Eighth Circuit reversed. Pet. App. A1-A21. It held that the trial court erred in concluding that all existing student clubs at Westside were curriculum-related. The court noted that the "broad interpretation" of that concept advanced by Westside administrators "would make the [Equal Access Act] meaningless" and would allow any school "arbitrarily [to] deny access to school facilities to any unfavored student club on the basis of its speech content," which was "exactly the result Congress sought to prohibit by enacting the [Act]." Pet. App. A10-A12. Rather, the Eighth Circuit found that "[m]any of the student clubs at WHS, including the chess club, are noncurriculum-related." The court therefore concluded that Westside maintains "a limited open forum, and the [Equal Access Act] forbids discrimination against [respondents'] proposed club on the basis of its religious content." Pet. App. A14.

The Eighth Circuit next rejected petitioners' argument that the Equal Access Act violates the Establishment Clause. Pet. App. A14-A20. The court observed that the language of the Act "closely tracks the holding of the Court in *Widmar* [v. *Vincent*, 454 U.S. 263 (1981),]" where this Court upheld the constitutionality of equal access for student religious speech at the university level. Pet. App. A19. The court concluded that "[a]ny constitutional attack on the [Act] must therefore be predicated on the difference between secondary school students and university students." *Ibid.* The court of appeals determined in turn that any such difference had no constitutional significance "because Congress considered the difference in the maturity level of secondary students and university students before passing the [Act]," and because the court accepted Congress's fact-finding. Pet. App. A19-A20.

Finally, the Eighth Circuit ruled that it would reach the same result "under *Widmar* alone" even if Congress had never passed the Act, since the "facts in the case before us today are the same as the facts in *Widmar* except for the setting." Pet. App. A20.

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under the First Amendment definition of that concept set forth in *Widmar* v. *Vincent*, *supra*. Pet. App. B26-B27.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed. Westside High School's decision to permit voluntary, noncurriculum student clubs to meet after hours on school premises brought it within the scope of the Equal Access Act, and the school's decision to exclude respondents' Bible study club violated the nondiscrimination mandate of the Act. The Act is fully consistent with the Establishment Clause. It does not establish religion but simply affords equal access to an open forum without regard to the "religious, political, philosophical, or other content" of student speech. 20 U.S.C. 4071(a). The Establishment Clause itself was envisioned by the Framers as promoting the same values of equal access, by ensuring that no official orthodoxy would operate to block access by any religion to the open forum of American society.

Congress passed the Equal Access Act by overwhelming bipartisan majorities in response to widespread reports that public secondary schools were actively discriminating against religious speech. Congress learned that schools often permitted students to form clubs to meet after hours on school premises to pursue whatever interested them—so long as it was not religion. In the Equal Access Act, Congress sought to promote student free speech by specifying that any school that accepted federal financial assistance and had a "limited open forum" could not deny "equal access" to that forum on the basis of the content of the student speech. To provide clear guidance, to eliminate confusion in the law, and to fore-

stall costly and divisive litigation, Congress further specified that a school had such a "limited open forum" whenever it permitted "one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b).

Westside has a limited open forum under the Act. Some 30 student clubs meet at Westside during noninstructional time. Petitioners contend that every one of these clubs is related to the school's educational mission, and therefore that none is "noncurriculum related." Congress did not intend the Act to be such an empty response to the real problem it perceived. The language of the statute and its history indicate that a club is noncurriculum related not only when a school says so, but when it is not "directly related" (20 U.S.C. 4072(3)) to the courses the school offers—its curriculum. The noncurriculum related clubs at Westside include the chess club and several community service clubs—Peer Advocates, Interact (connected with Rotary International), and Zonta. If the Act is to have any meaning, these clubs cannot reasonably be viewed as "directly related" to the curriculum at Westside.

Permitting equal access to *all* speech without regard to content does not establish religion. In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that permitting equal access for religious speech to a university's open forum did not contravene the Establishment Clause. In passing the Equal Access Act, Congress made specific findings that secondary school students—no less than university students—were able to comprehend the basic principle that free speech in an open forum is not state-sponsored speech, and the district court made similar findings in this case. The Act protects an open forum for individuals and groups to speak as *they* choose, and such individual choices do not constitute state establishment of religion.

Congress triggered coverage under the Act whenever a school accepting federal financial assistance permits one or more noncurriculum clubs to meet. This standard may, in particular cases, impose nondiscrimination require-

ments on schools that did not previously have open forums under *Widmar*. Congress provided a precise definition of "limited open forum" to provide clear guidance to school officials and students. But *Widmar*'s Establishment Clause analysis remains fully applicable. Under this Court's precedents, a limited open forum may be established by policy as well as by practice. The effect of the Act is to establish such a forum by policy at secondary schools where the triggering standard—one or more noncurriculum clubs—is met. Given such an open forum policy, *Widmar* teaches that permitting equal access to religious speech does not violate the Establishment Clause.

ARGUMENT

I. The Equal Access Act forbids content-based discrimination against student speech in the Westside High School student club program

A. Religious discussion and worship are core forms of speech protected by the First Amendment, and cannot be barred from an open forum on the basis of content

Congress considered and passed the Equal Access Act against the backdrop of the core constitutional values of free speech and the free exercise of religion. The students in this case sought access to school premises during noninstructional time to form a Bible study club. They regarded this activity as an important part of the practice of their religous beliefs.[11] The speech that Westside school officials saw fit to exclude was thus doubly protected under the Constitution.

First, religious speech enjoys the "full measure of protection" afforded by the Free Speech Clause to other types of speech. *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment). Religious ideas, "no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open . . . .'" *Id.* at 640 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Cases involving religious speech,

[11] See J.A. 117, 190, Tr. 166, 230.

in fact, have provided the formative materials out of which this Court has fashioned many of the basic principles of free speech doctrine.[12]

Second, the Free Exercise Clause requires that government accommodate the "freedom to develop and preach religious ideas and practices." *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring in the judgment). Like freedom of speech and freedom of the press, freedom of religion occupies a "preferred position" in our constitutional system. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109, 115 (1943). Where the right to the free exercise of religion is infringed by the prohibition of religious activities, the State must demonstrate that the prohibition is necessary to serve state interests "of the highest order." *McDaniel*, 435 U.S. at 628 (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)).

The fact that Bridget Mergens and her fellow students sought to exercise their First Amendment rights on public school property does not abrogate these basic constitutional protections.[13] Under this Court's analysis, the amount of protection provided speech on government property depends on the nature of the forum in which the speech occurs. Places which "by long tradition or by government fiat have been devoted to assembly and debate"—like public parks and streets—are "public forums." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A State may exclude speakers from a public forum because of the content of their speech only when the exclusion is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Ibid.* Similarly, a State may decide to open government property to the public or some segment of it for

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[12] See, *e.g.*, *Jamison* v. *Texas*, 318 U.S. 413 (1943); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1947).

[13] See, *e.g.*, *Board of Educ.* v. *Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

use as a place for expressive activity. Although nothing in the Constitution requires the States to establish such forums or to retain indefinitely their open character, so long as a State does so these limited public or "open forums" are subject to the same restrictions that apply to their traditional counterparts: speakers cannot be excluded absent a compelling state interest. *Id.* at 46; *Widmar* v. *Vincent*, 454 U.S. 263, 269 (1981); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Finally, a State may restrict access to a nonpublic forum as long as the restrictions are reasonable, and are not intended to suppress a particular point of view. *Cornelius*, 473 U.S. at 800.[14]

The "fundamental principle" of the public forum is that state regulation of speech must be content-neutral. *Widmar*, 454 U.S. at 277. That tenet reflects our Nation's deep-seated conviction that there is an "'equality of status in the field of ideas.'" *Police Dep't* v. *Mosley*, 408 U.S. 92, 96 (1972) (citation omitted). Once it has opened a forum to expressive activity, the "government must afford all points of view an equal opportunity to be heard." *Ibid.* In light of the special care with which the Founders guarded religious speech, it was long assumed that free speech rights of access to an open forum extended *a fortiori* to religious expression. See, *e.g.*, *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Saia* v. *New York*, 334 U.S. 558 (1948); *Murdock*, *supra*.

This Court confirmed that assumption in *Widmar* v. *Vincent*, *supra*. There, the Court held that a public university's practice of excluding religious speech from its limited open forum violated the First Amendment. The university had contended that its exclusionary policy was justified by the State's compelling interest in complying with the Establishment Clause. This Court held instead

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[14] Discrimination based on viewpoint is prohibited without regard to the nature of the forum. See, *e.g.*, *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Tinker*, 393 U.S. at 510-511.

that "an 'equal access' policy" affording student religious groups the same rights to meet enjoyed by other student groups would not run afoul of the Establishment Clause, and was indeed mandated by the Free Speech Clause. 454 U.S. at 267-271.[15]

B. The Equal Access Act ensures that student groups at covered schools will not be denied the same right to meet that the school extends to other student groups solely on the basis of the content of their speech

1. Against this constitutional background, Congress considered and passed the Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302-1304, 20 U.S.C. 4071-4074. The Act was prompted by widespread reports of discrimination directed against religious speech that persisted in the Nation's schools even in *Widmar*'s wake.[16] According to extensive findings in the reports on earlier versions of the Act[17] and as emphasized in the de-

[15] The students' complaint in this case alleged that the Westside school officials violated their rights under the Equal Access Act, the Free Speech Clause, and the Free Exercise Clause. For the reasons set forth below, the school officials violated the Act, and the Act does not contravene the Establishment Clause. The Court therefore need not reach the students' Free Speech and Free Exercise claims in order to decide this case.

[16] The extent of the discrimination was detailed in seven days of hearings. See *Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 37-84 (1983) [hereinafter *Hearings on S. 185 and S. 1059*] (student/faculty panel); *id.* at 141-154, 168-172; *Hearings on the Equal Access Act: Hearings on H.R. 2732 Before the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 16-17 (1983) [hereinafter *Hearings on H.R. 2732*] (faculty representative); *id.* at 35-40 (student/faculty representatives); *Religious Speech Protection Act: Hearing on H.R. 4996 Before the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 53-57 (1984) [hereinafter *Hearing on H.R. 4996*] (student representative).

[17] Congress sought "to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and freedom of religion" accruing to secondary school students who desired to exercise those rights during extracurricular periods when other activities were permitted by the school. S. Rep. No. 357, 98th Cong., 2d Sess. 3 (1984); see also *id.* at 11-21 (reviewing instances of discrimination, need for clarification of the law); H.R. Rep. No. 710, 98th Cong., 2d Sess. 1-2 (1984) (reviewing purpose to eliminate discrimination); *id.* at 3-6 (noting widespread misunderstanding of law, need for clarification).

bates,[18] Congress acted to eliminate official "hostility" towards religious expression in the public schools that had led to the suppression of religious speech. S. Rep. No. 357, 98th Cong., 2d Sess. 11 (1984). Congress found that school officials across the Nation—driven by rigid readings of this Court's Establishment Clause cases and fears of aggressively separationists litigation—had singled out religious liberty for discriminatory treatment. Their suppression of free religious speech fueled the "tragic perception that the government is affirmatively hostile to reli-

[18] As Senator Hatfield, co-sponsor of the version of the bill eventually enacted, said of his bill, "where there is an action that is taken by [a school board] * * * which denies a right that is guaranteed under the Constitution, then the Congress of the United States, I think, has a duty and an obligation to step in and remedy that violated right." 130 Cong. Rec. 19,217 (1984). The debates are replete with like statements. See, *e.g.*, *id.* at 19,235 (Sen. Levin) ("it is a gross intrusion now, that the status quo right now has State officials, teachers, and administrators, making judgments and characterizations on what constitutes religious speech after school because many are told that is something which they must prohibit"); *id.* at 19,237 (Sen. Bumpers) ("what this equal access amendment will guarantee, is that there be no official hostility toward religion, and that the schools not discourage or discriminate against the free exercise of religion"); *id.* at 19,242 (Sen. Mattingly) ("[The Act] would put religious speech on an equal footing with other types of speech in America's public schools. * * * Schools today are being hostile toward religion. Not neutral, but plainly antagonistic."); *id.* at 19,242-19,243 (Sen. Jepsen) ("[testimony in the hearings showed that] the state has been perceived [by students] as being hostile toward religion. * * * We must * * * restore students' first amendment rights of free speech and free exercise of religion. We must not continue to discriminate * * *. We must eliminate the antireligious bias that has permeated the public school system."); *id.* at 19,243 (Sen. Dole) (erroneous circuit court decisions have "forced [schools] into a posture of being hostile" to religion); see also *id.* at 19,238 (Sen. Durenberger); *id.* at 19,245 (Sen. Thurmond); *id.* at 20,936 (Rep. Lott); *id.* at 20,939 (Rep. Jeffords); *ibid.* (Rep. Nielson).

gious expression." S. Rep. No. 357, *supra*, at 21. Congress therefore sought to clarify and confirm the right of secondary school students to engage in religious speech on the same terms as they could engage in other types of speech.

Although prompted to action by evidence of discrimination against religious speech, Congress did not grant religious speech any preferred status in the Act. Rather, the legislature's intention was to "make equal the right of freedom of speech to any and all subject fields" rather than to create "special rights." [19] This is reflected in the language of the final bill.[20] Its operative section provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

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[19] 130 Cong. Rec. 19,234 (1984) (Sen. Hatfield).

[20] The Equal Access Act's predecessors included S. 425, 98th Cong., 1st Sess. (1983); S. 815, 98th Cong., 1st Sess. (1983); H.R. 2732, 98th Cong., 1st Sess. (1983); H.R. 4172, 98th Cong., 1st Sess. (1983); and H.R. 4996, 98th Cong., 2d Sess. (1984). A clean version of H.R. 4996, retitled H.R. 5345, 98th Cong., 2d Sess. (1984), was reported out of committee and debated on the floor of the House. The bill, which sanctioned those schools violating its terms with a cut-off of federal funding, failed passage under a suspension of the House rules. See 130 Cong. Rec. 12,214, 12,263-12,264 (1984). A modified version of S. 1059, 98th Cong., 1st Sess. (1983); the Equal Access Act, was offered by Senators Hatfield and Denton as an amendment to S. 1285, 98th Cong., 2d Sess. (1984) (H.R. 1310, 98th Cong., 1st Sess. (1983)), the Senate's much larger Education for Economic Security Act. 130 Cong. Rec. 15,003 (1984). On June 27, before substantial debate on the bill, Senators Leahy and Hatfield offered a perfecting amendment (modified by an addition by Senator Danforth) introducing the language later enacted. See *id.* at 19,219 (perfecting amendment); *id.* at 19,230-19,231 (perfecting amendment including Danforth modification). The Senate accepted the amendment by a vote of 88 to 11 on June 27. *Id.* at 19,252, 19,324-19,325. The Act was debated in the House under a suspension of the rules on July 25, 1984; by a vote of 337 to 77, the House concurred in the Senate amendment to H.R. 1310. *Id.* at 20,951.

20 U.S.C. 4071(a). The next section defines "limited open forum":

> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

20 U.S.C. 4071(b).

Reports and debates on earlier versions and the final version of the Act reflect a general intent to extend the principles enunciated by this Court in *Widmar* to public secondary schools. As Senator Hatfield explained, nothing in the Act requires schools to permit any student activities outside of the formal instructional activities of the school:

> We are not directing the school to set up such a forum. We are merely recognizing that the schools do have them in many instances. * * * For those that do have, what we are saying is that once this school establishes that forum, and borrowing from the Court in the Widmar case * * *, once the school sets up that forum it should not discriminate as to the content of the speech in that forum.

130 Cong. Rec. 19,222 (1984). As Senator Thurmond put it:

> To deny the * * * utterance of religious speech on school property while allowing other forms of protected speech, is to violate the first amendment * * *. The Supreme Court has already made this principle applicable to publicly supported colleges and universities in the Widmar case. It is now time for Congress to extend this protection to the public school systems of this Nation.

Id. at 19,245.[21] Representative Goodling, who along with

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[21] Senator Hatfield, co-author of the final language, reiterated that view. See 130 Cong. Rec. 19,233 (1984) ("We have cases that have denied students the rights to express a viewpoint on the subject of religion where they can do so on any other subject. * * * [T]his case has been settled on higher education campuses, and it has been settled in favor of my position. At the [university at issue in *Widmar*,] * * * officials said students can have a voluntary

Representative Perkins ushered the Senate amendment through the House, agreed:

> All we are saying is that since the Supreme Court has not acted at this point, since there is controversy in the lower courts, there should be some guidelines for the school district so they know where they stand.
>
> Most of them are continuing to operate today just as this legislation says they are allowed to operate. So we are not asking for anything new. We are not asking for anything more.

Id. at 20,682.[22]

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organization to meet on any subject but religion. The Supreme Court said no. Once the university established the right of [a] forum they cannot dictate the content of the forum without violating the freedom of speech."); *id.* at 19,218 ("We could sit back and wait until some court case is appealed to the Supreme Court, and the Supreme Court, under the precedent of the Widmar case—I am not a lawyer, but I would predict that the Court would rule in the same way when it related to a secondary school. Madam President, that is the basic philosophy of this amendment; that is the bottom line."); *id.* at 19,217 ("you can equally present this case as purely a matter of freedom of speech[.] * * * When the Supreme Court * * * decided [*Widmar*] * * * they stated * * * that once an institution sets up the right of a forum, that institution cannot dictate the content of the forum without violating the freedom of speech.").

See also 130 Cong. Rec. 19,237 (1984) (Sen. Levin) ("once a university has opened its facilities for use by student groups, it cannot exclude specific groups because of the religious content of their speech. This amendment seeks to codify that principle at the secondary school level."); *id.* at 19,239 (Sen. Biden) (bill applies *Widmar* prohibition of exclusion once "school has created a forum that is generally open to student groups" at secondary school). For statements in a similar vein, see *id.* at 19,229 (Sen Denton); *id.* at 19,234 (Sen. Hatfield); *id.* at 19,241 (Sen. Nickles); *id.* at 19,247 (Sen. Grassley); *id.* at 19,347 (Sen. Specter); *id.* at 20,939 (Rep. Neilson); *id.* at 20,940 (Rep. Coats); *id.* at 20,944 (Rep. McEwen); *id.* at 20,947 (Rep. Darden); *id.* at 20,948 (Rep. Perkins).

[22] Earlier incarnations of the Act were constant in their aim to "codify" *Widmar*. "The standard of 'equal access' was used by the Supreme Court in *Widmar* v. *Vincent* to describe the free speech principle safeguarded by [the Act's operative provision]. * * * In [that provision], as in the Supreme Court decision, the

Faithful to the "equal access" theory underlying *Widmar*, Congress adopted language in the final bill to clarify that the bill was not giving religious speech a preferred position. While the Act was prompted by evidence of discrimination against religious expression, Congress expressly protected "political, philosophical, or other" speech as well. 20 U.S.C. 4071(a).[23]

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guarantee of equal access means that religiously oriented student activities of an extracurricular nature would be allowed under the same terms and conditions as other extracurricular activities." S. Rep. No. 357, *supra*, at 38-39 (footnote omitted); see also, *e.g.*, *id.* at 3, 5-11, 23, 29, 33-36; H.R. Rep. No. 710, *supra*, at 1-4, 6-7; *Hearings on S. 815 and S. 1059*, *supra*, at 3-4, 8-10, 15-16 (Sens. Thurmond, Hatfield explaining bill as application of *Widmar*), 26 (Sec'y of Educ. Bell) (same), 19-20 (letter from L. Tribe opining that S. 815 constitutional as application of *Widmar*); *Hearings on H.R. 2732*, *supra*, at 3, 8, 12 (similar statements by Reps. Lott (sponsor), Bartlett); *Hearings on H.R. 4996*, *supra*, at 5, 10, 116-117 (similar statements by Sen. Hatfield, Reps. Bonker (sponsor), Perkins, Goodling).

[23] Earlier versions of the Act specifically safeguarded religious speech. See S. 425, 98th Cong., 1st Sess. § 2(b) (1983); S. 815, 98th Cong., 1st Sess. § 3 (1983); H.R. 2732, 98th Cong., 1st Sess. § 2(b) (1983); H.R. 4996, 98th Cong., 2d Sess. § 3 (1984); H.R. 5345, 98th Cong., 2d Sess. § 3 (1984); S. 1059, 98th Cong., 1st Sess. § 3(b) (1983). At the hearings, legal scholars recommended expanding the language. Professor Tribe confirmed, in his view, the constitutionality of the bills' focus on religious speech, given their goal to redress religious discrimination. He recommended against removing the specific protection of religious speech because of the possibility that the bill could then be interpreted to *exclude* protection for it. *Hearing on H.R. 4996*, *supra*, at 47-50. However, in light of the potential Establishment Clause challenges to such language, Tribe suggested that Congress clarify its "equal access" premise by confirming that free speech protection extends to all speech, regardless of its religious, " 'political,' * * * 'or other content.' " *Id.* at 50. See also *Hearings on H.R. 2732*, *supra*, at 139-140 (Prof. A. Loewy).

H.R. 5345 was criticized on similar grounds in the House. See, *e.g.*, 130 Cong. Rec. 12,222 (1984) (Rep. Frank); *id.* at 12,232 (Rep. Shannon). According to these and other critics, the Hatfield/Leahy perfecting amendment successfully clarified the premise of the Act. See, *e.g.*, *id.* at 19,243 (Sen. Mitchell); *id.* at 20,933 (Rep. Frank) (supporting passage).

At the same time, however, Congress was troubled about continuing confusion and uncertainty in the state of the law. The legislature's decision to act in the first place was prompted in part by a desire to eliminate such confusion. Congress found that the discriminatory suppression of religious speech by school administrators was occasioned not so much by "malice" as by their "misunderstanding" of existing law.[24] Expressing confidence in the eventual resolution of the issue by this Court,[25] Congress nevertheless decided to correct present violations and to forestall further costly and divisive litigation.[26]

In view of this background, Congress was concerned not to perpetuate uncertainty and confusion through its choice of imprecise statutory language. The legislators thus carefully focused on and refined that language, making it highly specific. The penultimate version of the bill tracked the language of this Court's decision in *Widmar*, specifying that the Act was triggered whenever a school implemented a "policy or practice which generally permits students or groups of students, or both, to engage in voluntary extracurricular activities" on school prem-

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[24] 130 Cong. Rec. 20,936 (1984) (Rep. Lott). In particular, Congress found that misunderstanding was fueled by lower court decisions which erroneously concluded that public schools could not have "public forums" for purposes of the Establishment Clause. See, *e.g.*, S. Rep. No. 357, *supra*, at 6-11 (criticizing rationale of courts in *Brandon* v. *Guilderland Bd. of Educ.*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), and *Lubbock Civil Liberties Union* v. *Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983)).

[25] See, *e.g.*, 130 Cong. Rec. 19,218 (1984) (Sen. Hatfield); see also *id.* at 19,221 (Sen. Leahy) ("the courts are basically doing a good job. But * * * the level of doubt and confusion on the issue of equal access impels our action now.").

[26] See, *e.g.*, 130 Cong. Rec. 19,243 (1984) (Sen. Dole) (Act necessary to clarify "what should be obvious" given hostility towards religion engendered by *Brandon* and *Lubbock* decisions); *id.* at 19,244 (Sen. Mitchell) (language to provide "clear and concise guidance to school officials"); *id.* at 19,235 (Sen. Levin); *id.* at 20,939 (Rep. Nielson); see also S. Rep. No. 357, *supra*, at 12, 14, 21 (emphasizing cost to taxpayers from litigation).

ises.[27] However, this *Widmar*-inspired language did not survive. Instead, Congress deliberately moved away from this rather general formulation in the perfecting amendment that became law, specifying that a "limited open forum" triggering the nondiscrimination protections of the Act exists at a public secondary school "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." See 130 Cong. Rec. 19,219 (1984).

This drafting change, resulting in a low triggering standard (one or more noncurriculum related groups), was by no means inadvertent. Senator Leahy—a cosponsor of the amendment—explained that the new definition was designed to remove "some lingering doubts about the specificity of one or two key concepts. One of those was the concept of the limited open forum—the very heart of the bill." 130 Cong. Rec. 19,221 (1984). Senator Leahy noted that "the language of the earlier draft might have been interpreted to allow the school's actions to differ from their words." *Ibid.* A school could, for example, assert that it did not have a limited open forum and was therefore not covered by the Act, and then consider student groups wishing to meet on a case-by-case basis, once again discriminatorily excluding religious groups. *Id.* at 19,221-19,222. As Senator Leahy concluded, "[t]he point is that a limited open forum should be triggered by what a school does, not by what it says." *Id.* at 19,222.[28]

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[27] See S. Rep. No. 357, *supra*, at 1. Compare *Widmar*, 454 U.S. at 267 (university forum "generally open for use by student groups"). See also S. Rep. No. 357, *supra*, at 38 ("Following the language of the Supreme Court in *Widmar* v. *Vincent*, the word 'generally' indicates that the policy or practice permits a variety of extracurricular activities.").

[28] Senator Dole made the same point: "Perhaps the most important improvement made by this perfecting amendment is to clarify the meaning of a 'limited open forum.' This change will preclude a school from practicing one policy toward the use of school facilities by student groups, while officially adopting another." 130 Cong. Rec. 19,243 (1984).

Under the Act as passed, therefore, if what a school does is permit one or more noncurriculum related groups to meet, then it has a limited open forum and the equal access provision of the Act is thereby triggered. The Act thus "sets forth common-sense rules to guide schools in opening their doors to these noncurriculum groups in a manner that stresses fairness and equity * * *." 130 Cong. Rec. 19,221 (1984).[29]

2. While broadly providing that a school allowing "one or more noncurriculum related student groups" to use its facilities would come within the Act, Congress declined to define the term "noncurriculum related." Seizing upon Congress's silence, petitioners here expansively argue (Pet. Br. 56-81) that all of the many student clubs at Westside High School—including the chess and service clubs—are related to the school's curriculum. This is because, according to petitioners, Congress's failure to define "noncurriculum related" reflects a deliberate decision "to allow local school officials to employ a local definition of curriculum, subject only to judicial review to insure against abuse." Pet. Br. 63.

We disagree. As the court of appeals concluded in this case, such a malleable definition of "noncurriculum related" would make the Act meaningless:

> A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.

Pet. App. A12; see also *Garnett* v. *Renton Sch. Dist.*, 874 F.2d 608, 614 (9th Cir. 1989), petition for cert. pending, No. 89-641 (filed Oct. 16, 1989). To be sure, the breadth of the concept of "curriculum" depends, as the students' expert testified at trial (J.A. 406-407), on one's theory of education. However, both the language and the purposes of the Act indicate that Congress intended a definition of "noncurriculum related" that tied it narrowly—by contrasting it immediately—to the course of studies actually offered by the school.

First, Congress did define what it meant by the "meeting[s]" (20 U.S.C. 4071(a)) that had to be accommodated under the Act. Under that definition, "the term 'meeting' includes those activities of student groups which are * * * not *directly related* to the school curriculum." 20 U.S.C. 4072(3) (emphasis added). The popular meaning of the term "curriculum" is a "fixed series of studies required * * * for graduation," or "all of the courses * * * offered in a school." *Webster's New World Dictionary* 348 (2d College ed. 1974). Congress's use of the phrase "directly related" indicates that it exempted from the "noncurriculum related" category only those clubs closely connected to courses offered by the school.[30]

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[29] We therefore do not agree with the district court's statement that "[t]he Act's applicability turns on whether or not the public secondary school has created a limited open forum, as was found by the Supreme Court to exist in *Widmar*." Pet. App. B14. Instead, the applicability of the Act turns on whether the school accepts federal financial assistance and affords an opportunity to meet for one or more noncurriculum related student groups, regardless of whether the school's actions would have created a limited open forum under *Widmar*. If the Act is triggered, then the school is considered to have established a limited open forum open to all groups without regard to the content of their speech, as provided in the Act. In contrast, focusing on whether the school had established a limited open forum under *Widmar*—without regard to the language of the Act—would reintroduce the very uncertainty and confusion Congress sought to exorcise through the perfecting amendment.

[30] Other provisions of the Act make it clear that the "noncurriculum related" activity must additionally be one that is "voluntary_ and student-initiated." 20 U.S.C. 4071(c). As Section 4071(b) itself specifies, the Act is triggered when the school "grants an offering to or opportunity for"—rather than when the school itself initiates—noncurriculum related activities. The requirement that an activity be "student-initiated" would disqualify as "noncurriculum related" those activities that are sponsored by a school as part of its administration or participation in the larger educational system—presumably including activities like yearbook groups, and participation in national contests. Cf. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. at 271 (1988).

Although not completely clear, the legislative record on balance confirms this objective test. As Senator Hatfield explained the new term:

> [By] non-curriculum-related student groups, what we are recognizing there is that in a number of schools, students in a class of Spanish or French will form a French club or a Spanish club where they get together to talk nothing but that language, to get conversational proficiency. We are recognizing that as really *a kind of extension of the classroom.* That is the kind of category of clubs that we are trying to incorporate as curriculum related, those not covered by this amendment.

130 Cong. Rec. 19,223 (1984) (emphasis added).[31] Representative Goodling suggested a similar definition of "noncurriculum related" in the House:

> First, is the subject matter * * * of a type which a public school could sponsor? In other words, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category. A young Democrat or Republican Club, private social organizations, or religious groups would not be of the type which a school could sponsor.
>
> Second, does the school or a schoolteacher require or directly encourage student participation in such group in connection with curriculum *course work*?
>
> If *both* elements of this two-part analysis are satisfied, the meeting would be considered curriculum related and the equal access policy would not be triggered.

Id. at 20,942 (emphasis added).

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[31] Senator Hatfield later expressed the same idea, albeit less clearly, when he indicated that sports activities would be "curriculum related" because "that is how [schools] can use [their] tax dollars"—to hire the coaches of the physical education department. 130 Cong. Rec. 19,223 (1984). We recognize that there are contrary indications in the legislative history. At one point, for example, Senator Gorton asked whether "the school district [would] have the full authority to determine where the line is to be drawn between curriculum related activities and noncurriculum related," and Senator Hatfield, in an effort to blunt the questioning, responded "[w]e in no way seek to limit that discretion." *Ibid.*

An interpretation of "noncurriculum related" that equates it with those clubs not directly related to courses offered by the school also accords most closely with the larger objectives of the Act. First, such a definition provides a clear and predictable guideline to students and administrators alike. Second, the definition could not be circumvented by the articulation of any "broadly defined educational goal." Rather, the definition imports a relatively uniform and predictable content into the standards for application of the equal access policy.

Finally, our construction of "noncurriculum related" furthers the objectives of the Act to protect First Amendment freedoms. The heart of a school's educational mission is in the selection and teaching of its curriculum. See *Edwards* v. *Aguillard*, 482 U.S. 578, 597 (1987) (Powell, J., concurring); *Board of Educ.* v. *Pico*, 457 U.S. 853, 869 (1982) (plurality opinion). Student activities unrelated to the courses taught by the school are presumptively outside the area the school has selected as its educational mission.[32] Therefore, the fact that a school allows students to initiate and participate in such activities can rationally be regarded as evidence that the school has adopted an "open forum" policy. Cf. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. at 270-271 (school entitled to exercise less control over expression concerning noncurriculum related matters); *Pico*, 457 U.S. at 869 (plurality opinion) (same).

When the terms of Section 4071(b) are met—the school has opened its facilities to one or more noncurriculum related clubs—application of the Act is triggered. Without more, the statute dictates that free speech pro-

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[32] There is, in fact, some indication that Congress's selection of the word "noncurriculum" was quite deliberate. Witnesses at the hearings emphasized that the term "extracurricular" implied a connection with a school's curriculum. *Hearings on H.R. 2732, supra,* at 209 (J. Novik, ACLU); *Hearing on H.R. 4996, supra,* at 97 (D. Kelley, NCC); see also S. Rep. No. 357, *supra,* at 38 (emphasizing that protection of Act cannot extend to religious speech occurring in context of curriculum).

tections be extended to other students who wish to participate in the forum.

This plain-language construction of the statute does not intrude unduly upon the discretion of local school officials. The Act is triggered only by a local decision to accept federal financial assistance, and a local decision to permit one or more noncurricular student groups to meet. A school board desirous of excluding student religious clubs (or, for that matter, political or philosophical clubs) retains discretion, under the Act, to exclude *all* noncurricular student clubs, or to refuse federal funds.[33] It does not retain discretion to accept federal funds, open the school to one or more noncurricular clubs, and then discriminate against religious clubs on the basis of the content of their speech. The Act *does* intrude on the discretion of local school officials to that extent, which is precisely what Congress intended. See 130 Cong. Rec. 19,223 (1984) (Sen. Hatfield).

At the same time, this Court has recognized that even where an "open forum" exists on school property, educators retain the right to exclude "even First Amendment activities" that "substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 277. Nothing in the statute or its legislative history indicates that Congress disagrees. The statute also specifies that the school retains the ability to prohibit meetings which "materially and substantially interfere with the orderly conduct of educational activities within the school." 20 U.S.C. 4071(c)(4).[34] In addition, Congress deliberately added a provision, now codified as Section 4071(f), to the perfecting amendment in order to confirm that "[n]othing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."[35]

[33] Nationwide, federal financial assistance accounted on average for 6.4 percent of a public secondary school's budget in 1987. In Nebraska, the figure was 6.1 percent. National Center for Education Statistics, U.S. Dep't of Education, *Public Elementary and Secondary School Revenues and Current Expenditures Fiscal Year 1987: Final Tabulations; and Fiscal Year 1986: Revised Final Tabulations*, at 7. 9 (1988). Cf. *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (describing as "more rhetoric than fact" argument that federal statute imposing loss of five percent of federal highway funds for failure to raise state drinking age was coercive).

[34] The language tracks that of *Tinker*. See 393 U.S. at 513.

C. Westside High School has a limited open forum under the Equal Access Act

In this case, the students persuasively demonstrated that Westside High School allows noncurriculum related clubs, and thus has a "limited open forum" within the meaning of the Act. At trial, Westside's principal acknowledged that the "Peer Advocates" program—a service program in which students worked with those enrolled in special education classes—was not directly related to the courses offered by the school. J.A. 231-236.[36] Without more, the existence of this noncurriculum related club triggered the nondiscrimination safeguards of the Act.

[35] As Senator Danforth explained the point of his modification:

> I think that the schools have the general authority, and should have the general authority, to try to create an atmosphere which is conducive to the intellectual, physical, psychological development of children, and that the schools have the inherent power to take such actions as are conducive to such development of kids, and in like manner, to try to prevent those activities which are injurious to the mental, emotional, and physical development of children.

130 Cong. Rec. 19,228-19,229 (1984). He and other members of Congress placed special emphasis on the concluding phrase of Section 4071(f), apparently in order to respond to concerns that the "open forum" obligations of schools somehow removed their authority to exclude cults and other coercive groups. See, *e.g.*, *ibid.*; 130 Cong. Rec. 19,224 (1984) (Sen. Hatfield) (authority to prohibit disruptive activities); *id.* at 20,941 (Rep. Goodling) (authority to exclude "hate groups").

[36] Subsequently, Dr. Findley offered that the Peer Advocates program could be related, presumably indirectly, to the sociology and psychology courses offered by the school insofar as it involved a "service" activity. J.A. 233.

Similarly, the chess club, as well as Interact and Zonta, appear to be noncurriculum related clubs. Although petitioners contended that the chess club was related to courses in math, the connection of chess to math—even if math teachers have experimented with encouraging chess playing by their students (see J.A. 442-444)—is attenuated at best. To maintain that any club which teaches "critical thinking" (J.A. 220-221) is thereby related to courses in math converts to that extent the line drawn by Congress into a toothless standard. Indeed, chess clubs were frequently cited in the debates on the Act as precisely the sort of noncurriculum related activity that would trigger the Act's protections. See, *e.g.*, 130 Cong. Rec. 19,216 (1984) (Sen. Denton); *id.* at 19,223 (Sen. Hatfield); *id.* at 19,240 (Sen. Biden); *id.* at 19,242 (Sen. Jepsen).

There is more. Interact is a service organization affiliated with Rotary International; Zonta is a similar organization affiliated with an international women's organization of the same name. Petitioners assert that participation in Interact and Zonta is "curriculum related" because this activity teaches ideals of community service, which are goals of the Social Studies department. However, while Westside students may earn extra credit for a variety of service projects, some of which may be carried out through Interact, "it is certainly not always a one-to-one match." J.A. 302. The service clubs and the Social Studies department exist independently, and the school's literature about the clubs and the Social Studies courses draws no explicit connection between them. See J.A. 299-300; 481, 485.

Despite the foregoing, petitioners maintain that Westside does not fall within the Act because every club at Westside must have a faculty "sponsor," and that the Act's "limited open forum" is inconsistent with such a notion of sponsorship. See 20 U.S.C. 4071(c). Petitioners tie their claim most tightly to the provision in paragraph 2 of Policy 5610 that "[s]chool-sponsored clubs and organizations are those directly under the control of the

school administration, and shall have faculty sponsorship." J.A. 488.

This rationale, however, appears to be more a post hoc justification than a guiding principle. First, the school's effort to read so much into its commitment to "sponsorship" is emphatically denied by the students, who repeatedly testified that many faculty "sponsors" functioned like monitors.[37] Nor is the principle—or the content claimed to accompany it (such as the commitment to present all issues in a neutral manner)—developed in any other school rule or regulation.[38] Third, the school "sponsors" two organizations, Interact and Zonta, that are affiliated with organizations that advocate specific philosophical commitments. See "Interact Sponsorship," Pamphlet of Rotary Int'l, No. 657-EN.[39] Finally, it appears that the only instance in which Westside has denied a request for a club based on the content of the proposed expression is the present case involving religious speech.[40]

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[37] See note 7, *supra*.

[38] The students therefore testified that they believed Westside had an "open forum." See J.A. 118, Tr. 129.

School Policy 5610 itself requires that the school establish "operational guidelines" for the clubs. J.A. 488. The school has never done so, although these would seem the natural place for rules concerning the balanced presentation of material during student activities.

[39] In light of the refrain in their brief that the school "endorses" all its activities, Dr. Findley's effort to distinguish as not endorsed the ideology of the Rotary Club (as opposed to the service projects the Club supports) is strained. J.A. 436-438. Rotary International itself maintains that, as sponsor, it "has control and supervision over all activities, policies, and programs of the Interact Club." "Interact Sponsorship," Pamphlet of Rotary Int'l, No. 657-EN, at 2.

[40] Westside denied two clubs—a soccer team and a girls' softball team—because it did not have the facilities to handle them and because competition in the area was inadequate. J.A. 293-294, 310. It also denied a request for a "Dungeons and Dragons" club, apparently because of student safety concerns. See J.A. 367 (denial because "with the negative kinds of commentary that was out in the newspaper et cetera and some of the things that had happened to youngsters playing it, it didn't seem appropriate"). The school used to have a "Hi-Y" club, which it discontinued because of the

In significant part, petitioners' argument is that, because all clubs at Westside are sponsored, it would be impossible to allow a religious club, because that club would have to be "sponsored" and "endorsed" by the school. See, *e.g.*, Pet. Br. 29, 50-53, 55. Petitioners' argument misses the point, and would render the Act a nullity. A school cannot keep a forum "closed" merely by placing the label "sponsored" on all clubs—except those it does not want to admit—that enter the forum. The fact that a given noncurriculum related club (such as a chess club) may be sponsored does not make it any less "noncurriculum related." A school need not, indeed under the Act cannot, offer a club for religious speech the concomitants of sponsorship. Rather, as the Act clarifies, all the school should offer is equal access to its facilities. See 20 U.S.C. 4071(c). That result would require no "radical restructur[ing]" (Pet. Br. 54) of current practice at Westside.

II. The Equal Access Act promotes the values of the Establishment Clause

A. Both the Equal Access Act and the Establishment Clause protect an open, neutral forum for religious and other expression

The Equal Access Act does not effect or promote "an establishment of religion." U.S. Const. Amend. I. On the contrary, by ensuring that public schools with open forums "effect no favoritism among sects or between religion and nonreligion, and * * * work deterrence of no religious belief," *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring), the Act serves the values that inform the Establishment Clause. For the Establishment Clause, no less than the Free Speech or Free Exercise Clauses, was included in the Bill of Rights to safeguard liberty. By prohibiting official

association of that club with the YMCA. J.A. 348-349. (Before 1970, the school had allowed a number of political groups to meet, but the arrangement was apparently part of a government class in which care was taken to ensure balanced presentation. J.A. 344-345; Tr. 476-479).

orthodoxy, it promotes "diversity and pluralism in all areas." *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984). The two Religion Clauses are thus complementary, not conflicting.[41] Just as the Free Exercise Clause protects the rights of individuals and groups to profess and practice their faith, the Establishment Clause ensures that those rights will not be burdened by being subordinated to a state preference for a particular faith or for no faith.

As this Court has explained, "the Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. at 673. The limits of permissible government action under the Establishment Clause "must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." *McDaniel* v. *Paty*, 435 U.S. at 638 (Brennan, J., concurring in the judgment).

Indeed, the origins of the Establishment Clause confirm its intended function of preserving and promoting pluralism and diversity. The principal criticism of early drafts of the Clause by members of the First Congress was that it might be interpreted in a manner "extremely hurtful to the cause of religion." 1 Debates and Proceedings in Congress 758 (J. Gales ed. 1834) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 758-759; see also *id.* at 758.

A policy of equal access was thus precisely the ideal envisioned by the Framers. Congress acted to implement such a policy in the Equal Access Act, not only for religious speech but for all speech. Its stated purpose was

[41] See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

"to clarify and confirm the First Amendment rights" of secondary school students. S. Rep. No. 357, *supra*, at 3.[42] The legislative record overwhelmingly reflects that broader aim (see generally, pp. 14-19, *supra*); more fundamentally, the plain language of the statute prohibits discrimination not only on the basis of the religious content of speech but "political, philosophical, or other content" as well. 20 U.S.C. 4071(a). This Court has acknowledged that such an objective to "promot[e] pluralism and diversity" is fully consistent with the dictates of the Establishment Clause. *Committee for Public Educ. & Rel. Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973).[43]

In addition, insofar as a legislature determines that a practice represents "a form of 'hostility' toward religion,

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[42] In the absence of any evidence that undermines the stated legislative intent, that intent must be accorded appropriate deference. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971); see *Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2571 (1988); *Edwards*, 482 U.S. at 586-587.

Amicus Anti-Defamation League suggests (Br. 5) that the Act is an effort to circumvent this Court's school prayer decisions. To the contrary, the Act bears no resemblance to bills that proposed constitutional amendments to allow prayer in the schools. Both chambers of Congress endorsed the Equal Access Act in large numbers—the Senate by a vote of 88 to 11; the House by a vote of 337 to 77. See note 20, *supra*. Senator Hatfield, co-author of the final language of the bill, had opposed a constitutional amendment allowing school prayer. See 130 Cong. Rec. 19,217 (1984) (Sen. Hatfield. Other supporters of the Act, including those who had opposed school prayer amendments, noted the difference between the initiatives. See *id.* at 19,237 (Sen. Bumpers); *id.* at 19,240 (Sen. Biden); see also S. Rep. No. 357, *supra*, at 28-29 (distinguishing between Act's purpose to end suppression of individual speech and cases disallowing school-sponsored prayer).

[43] See also *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672-673 (1970) (legitimate purpose to foster "moral or mental improvement" of community at large by granting tax exemptions to broad range of organizations, including religious ones); *id.* at 689 (Brennan, J., concurring) (legitimate purpose to exempt religious organizations "because they uniquely contribute to the pluralism of American society"); compare *Edwards*, 482 U.S. at 588, 594 (teaching variety of scientific theories, rather than limiting teaching, would have "clear secular intent"); *id.* at 604 (Powell, J., concurring).

'[correction of that practice] constitut[es] a reasonable and balanced attempt to guard against those dangers.'" *Nyquist*, 413 U.S. at 793 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970)). As this Court determined in *Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334 (1987), Congress may take action to guard the "benevolent neutrality" mandated by the Establishment Clause so as to "permit religious exercise to exist without sponsorship and without interference." And Congress, as well as the States, may take such action regarding the public schools. To require otherwise would be to "read into the Bill of Rights * * * a philosophy of hostility to religion." *Zorach* v. *Clauson*, 343 U.S. 306, 315 (1952).[44]

Like the Establishment Clause itself, the Equal Access Act simply safeguards an open forum in which individuals or groups of individuals are free to engage in religious, nonreligious, or irreligious speech, as they see fit. Under the Act, use of a school forum depends on "voluntary" and "student-initiated" action. 20 U.S.C. 4071(c)(1). Meetings may not be sponsored by the school, the government, or agents or employees thereof; school employees can be present only as monitors; nonschool persons cannot direct, conduct, control, or regularly attend the meetings; no governmental body can influence the religious content of meetings, or require any person to participate in them; no public funds can be expended beyond the cost of providing meeting space; and no school agent or employee can be compelled to attend any meet-

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[44] For the same reason, the Equal Access Act in its earlier incarnations had just as constitutionally legitimate a purpose. While religious classifications cannot be used to impose "duties, penalties, privileges or benefits," they surely are permitted to accommodate religious practices, or "to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring in the judgment); see also *Edwards*, 482 U.S. at 617-618 (Scalia, J., dissenting).

ing against his or her beliefs. 20 U.S.C. 4071(c)(1)-(3) and (5); 4071(d)(1)-(4).[45]

The opening of a forum in which religious views may (or may not) be expressed by individuals—not by the State—communicates no message, neither one of endorsement nor one of disapproval, that would make religion relevant to status in the political community. *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. 3086, 3101 (1989). Where benefits offered for secular purposes by a State—here, an open forum—can only accrue to the advantage of religion through the decisions of private individuals, there is little if any danger that the "imprimatur of state approval" will descend. *Mueller* v. *Allen*, 463 U.S. 388, 399 (1983); cf. *Meek* v. *Pittenger*, 421 U.S. 349, 359-362 (1975)

[45] Amici suggest that the danger of sponsorship is increased because secondary students are subject to compulsory attendance laws. Amer. Jewish Comm. Br. 17; Anti-Defam. League Br. 21. However, the Act limits the time "open forums" may occur to "noninstructional time"—that is, "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." 20 U.S.C. 4072(4). The compulsory attendance laws clearly are not implicated by this case because the "forum" at Westside took place after school hours when other students were free to leave. Pet. App. A4; J.A. 60. Cf. *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 209-210 (1948) (release time program invalid where students "released in part from their legal duty [to attend school] upon the condition that they attend religious classes").

Amicus Anti-Defamation League also notes (Br. 27) that students could go elsewhere for their religious meetings (an argument that somewhat undermines the force of their "compulsory attendance" claim). See also Pet. Br. 53 n.22. The short answer to this is that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Grayned* v. *City of Rockford*, 408 U.S. 104, 118 n.40 (1972) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)); see also *Healy* v. *James*, 408 U.S. 169, 183 (1972) (group's possible ability to exist outside campus does not significantly ameliorate disabilities posed by denial of access to campus facilities); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975). The record indicates, in any event (see, *e.g.*, J.A. 165-166; Tr. 127, 136), that some students could not attend meetings in other places.

(Stewart, J.); *Board of Educ.* v. *Allen*, 392 U.S. 236, 243-244 (1968); *Walz*, 397 U.S. at 696 (Harlan, J.); *Aguilar* v. *Felton*, 473 U.S. 402, 417-419 (1985) (Powell, J., concurring).[46]

When a school establishes an open forum, it sends its students a signal that there *is* a political community—of which they are the members. Access to a school's open forum, no less than to a school's library, "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico*, 457 U.S. at 868 (plurality opinion). Access or its denial, like the freedom or lack of freedom to express opinions outside the classroom, importantly affects the educational process. See *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511-512 (1969).

Consequently, once a forum is "opened," equal access to it is necessary to confirm that no point of view is disfavored nor any member denigrated. Any contrary message is as impermissible if sent by the State in its role as educator as it is if sent by the State in any other role. See *Widmar*, *supra* (forum for college students); *Madison Joint Sch. Dist.* v. *Wisconsin Emp. Rel'ns Comm'n*, 429 U.S. 167 (1976) (forum for citizen involvement).[47] In short, "government may not as a goal promote 'safe thinking' with respect to religion [by] * * * fenc[ing] out from political participation" all those it regards as "overinvolved in religion." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment).

Nor are there any unconstitutional consequences that accompany recognizing the right to religious speech in a school's open forum.

[46] As the Court concluded in a similar case (*Mueller*, 463 U.S. at 400):

> The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefits at issue in this case.

[47] See also *Healy*, 408 U.S. at 180-181.

1. Religious groups receive only those "benefits" which accrue equally to all groups using the forum. Those benefits are truly "incidental"—both in the sense that they reach religious groups only as part of a "broad spectrum" of actual or potential recipients, and in the sense that they impose insignificant costs on the State (use of a classroom, the electricity to heat and light it, and perhaps the time of a school monitor). *Mueller*, 463 U.S. at 399. As this Court has repeatedly ruled, a religious group's "enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." *Widmar*, 454 U.S. at 273.[48]

2. There is, thus, no danger that allowing religious speech will be mistaken for sponsoring it: the very nature of a forum open to student use negates the possibility that a club will receive some "unique and exclusive benefit" of public recognition, approval or prestige. *Lynch*, 465 U.S. at 701 (Brennan, J., dissenting). Rather, as this Court made clear in *Widmar*, students are capable of understanding that a public school does not confer an "imprimatur" of state approval on every student group when it allows all members of the student community to use its facilities on equal terms. The same logic—that the "setting" in which religious expression occurs determines whether it is accompanied by a message of endorsement by the State—allows parishioners to sing carols in a public park (see *County of Allegheny*, 109

[48] See, *e.g.*, *Widmar* (general access to forum); *Kendrick*, 108 S. Ct. at 2571 (wide eligibility to receive funding); *Mueller*, 463 U.S. at 397 (tax deduction for actual educational expenses available to all parents); *Roemer* v. *Maryland Bd. of Public Works*, 426 U.S. 736, 746 (1976) (Blackmun, J.) (subsidies to all qualifying colleges and universities); *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971) (same, as far as construction grants); *Walz*, 397 U.S. at 671-673 (tax exemption to nonprofit organizations); *Board of Educ.* v. *Allen*, 392 U.S. 236, 243 (1968) (provision of secular schoolbooks to all students); *Everson v. Board of Educ.*, 330 U.S. 1, 16-18 (1947) (general program to pay pupils' transportation expenses, including reimbursement to parochial school children); cf. *Lynch*, 465 U.S. at 683 (dilute benefit to religion from displays of religious paintings and similar practices).

S. Ct. at 3111) and cities to put up holiday displays that contain religious elements (see *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). Likewise, while allowing certain speech in a nonpublic forum may carry the danger that an appearance of "favoritism" will be created (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion)), allowing that speech in an open forum carries no such danger (*id.* at 321 (Brennan, J., dissenting)).[49]

The situations in which this Court has invalidated government practices because they appeared to sponsor religion are vastly different. There is created in those cases a "crucial symbolic link" (*Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2576 (1988)) between state and religion that the Establishment Clause has been deemed to prohibit. Compare *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 389-392 (1985) ("symbolic union" between church and state where students move back and forth between religious and "public school" classes in the same private school building, and public school teachers may appear to be "regular adjunct[s]" to the religious school); *Abington Sch. Dist.*, *supra* (Bible readings part of prescribed curriculum, conducted under supervision of teachers, children may be excused from classroom during readings); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (state-drafted school prayer); *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203 (1948) ("release time" program for religious instruction on public school grounds, nonparticipating students kept at school for secular work).[50]

[49] In any case, a disclaimer by a school of endorsement should resolve any problem that might arise. See *Widmar*, 454 U.S. at 274 n.14; see also *County of Allegheny*, 109 S. Ct. at 3115 (Blackmun, J.). Just as a school can clearly identify the use of religious materials for objective study in the classroom (see *Abingdon Sch. Dist.*, 374 U.S. at 225), it can clearly identify the presence of religious expression as part of the pluralism of an open forum.

[50] The presence of teachers as "monitors" does not affect the analysis. Secondary school students, like adults, are used to the presence of police in public places. They recognize the disciplining role of teachers in many areas of school life. Conversely, teachers are statutorily mandated to act neutrally (see 20 U.S.C. 4071(c)(2)

3. Nor does the fact that the Act refers to forums in secondary schools provide any basis for distinguishing the result in this case from the result in *Widmar*. Amici for petitioner[51] argue that secondary school students are fatally impressionable. In amici's pessimistic view, high school students are to be stripped of basic constitutional rights enjoyed by college students because they are incapable of understanding that speech in a school forum—no matter how like a university forum in other ways—is not speech endorsed or sponsored by the State. This is both fanciful and pernicious. In the first instance, amici's argument equates to one that the government should enforce a content-based regulation of student speech. This censorious approach strikes at the heart of constitutionally protected liberties. As when government initiates such a regulation, the party raising the argument must bear a heavy burden of persuasion. In this case, petitioners do not even attempt to carry that burden (Pet. Br. 89-91); for their part, amici have not come close to adducing the type of evidence that would justify the regime which they seek to impose on the American educational system.

The facts in this case severely undermine the amici's argument. The district court specifically found that the format of an open forum would, in the case of Westside High School, sufficiently protect against the danger that allowing access would appear to confer the school's imprimatur. Pet. App. B11 n.1. Further, the court cred-

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and (3)), and there is no indication that it is difficult to "monitor" students in a neutral manner.

Nor indeed is there any "magic," as Professor Laycock has aptly put it, that changes the constitutional question when it involves a public school location. Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 9 (1986). Presence on government property of any type is simply one of many factors to be taken into account in weighing the danger of sponsorship. See, *e.g.*, *Widmar*, 454 U.S. at 274; *County of Allegheny*, 109 S. Ct. at 3111; compare *McCollum*, 333 U.S. at 231 (Frankfurter, J.) (noting that other "release time" programs that differ in some detail may be upheld).

[51] See Amer. Jewish Comm. Br. 13-14, 15-21; Anti-Defam. League Br. 22-23.

ited the testimony of respondents' expert on child development, who testified that students over the age of 12 could recognize the difference between endorsement and its lack. *Ibid.* That testimony comports entirely with common sense and the judgment of Congress.

Indeed, the proposition that the government "does not endorse everything it fails to censor"[52] is not a complicated one. The Act assumes understanding of that concept by no student below the secondary school level "as determined by State law." 20 U.S.C. 4072(1). The Act thus has within its purview those students whom the States themselves have concluded are sufficiently mature to handle more advanced concepts. Surely at that level of understanding, a student can readily recognize that not all uncensored speech is thereby sponsored speech (especially if the State is not "allowed" by the Constitution to censor it).[53] In any event, if the concept is somehow not immediately apparent to secondary school students, it certainly can be explained to them. In fact, given the bedrock importance of the principle that free speech is speech unsponsored by the State, it would seem essential that a high school civics education clarify the proposition. See *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681 (1986); *West Virginia Board of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943). Here, as elsewhere, the most effective teaching is not by precept, but by example.

More importantly, Congress carefully considered and made extensive findings concerning the capacity of students to distinguish free speech from state-sponsored speech. After hearing extensive testimony from students and administrators (see note 16, *supra*) and considering the conclusions of scholars (see S. Rep. No. 357, *supra*, at 8; H.R. Rep. No. 710, *supra*, at 4) and psychologists

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[52] Laycock, *supra* note 50, at 15.

[53] As the Court noted in responding to the claim that the bestowal of tax exemptions on religious organizations created a danger of sponsorship: "No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'" *Walz*, 397 U.S. at 675.

(see S. Rep. No. 357, *supra*, at 35), the Senate Committee on the Judiciary expressly found:

> [S]tudents below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other.

Ibid.; see also *id.* at 8-10.

In addition, the Committee concluded that current suppression of religious expression in the schools when other student activities were permitted had led "students reasonably [to] perceive the denial of access for religious speech as State hostility toward religion." S. Rep. No. 357, *supra*, at 36; see also *id.* at 10-11, 12, 19.[54] In its report, the House Committee on Education and Labor came to the same conclusions about public education's perceived hostility to religion. See H.R. Rep. No. 710, *supra*, at 3-6.

On the floor, members of Congress—from both sides of the aisle—strongly affirmed their agreement with the Committees' findings.[55] Moreover, they enacted final language from which coverage for elementary schools had been deleted, and which placed the determination of which students should be considered within secondary schools in the hands of the States.[56]

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[54] The Committee in turn registered its concern that the "tragic perception [held by students] that the government is affirmatively hostile to religious expression * * * could * * * lead to the national disaster of intolerance of religion." S. Rep. No. 357, *supra*, at 21.

[55] See, *e.g.*, 130 Cong. Rec. 19,218 (1984) (Sen. Dixon) (high school students "sufficiently sophisticated" to understand equal access); *id.* at 19,238-19,239 (Sen. Durenburger) ("as many experts acknowledge and as the young students who testified showed, students below the college age can understand that an equal access policy is one of State neutrality"); *id.* at 20,936 (discussing studies of adolescent psychology); see also, *e.g.*, *id.* at 20,933 (Rep. Frank); *id.* at 15,004 (Sen. Denton) (noting reasonable perception of hostility); *id.* at 19,216 (Sen. Denton) (same); *id.* at 19,221 (Sen. Leahy) (same).

[56] Compare 20 U.S.C. 4071(a) and 4072(1) with Equal Access Act, as introduced Feb. 22, 1984, Section 2(a) and Section 6(4), S. Rep. No. 357, *supra*, at 1-3. Congress had investigated during the hearings the possibility that coverage under the Act for elementary school children could raise graver problems because, for example, of their limited ability to initiate activities. See, *e.g.*, *Hearings on S. 815 and S. 1059*, *supra*, at 14-15 (Sen. Hatfield); *id.* at 228, 246-247, 256, 271 (organizational representatives); *Hearings on H.R. 2732*, *supra*, at 46-47, 235 (same); *id.* at 220 (Rep. Bonker); *Hearing on H.R. 4996*, *supra*, at 79, 100, 105 (organizational representatives).

Congress's conclusion, then, is far from one that is "unthinking," reflexive, or unconsidered. To the contrary, it is the deliberate conclusion of a representative body well-suited to evaluating and resolving factual issues. In our democratic system, that conclusion is entitled to deference from the Article III branch with its inherent institutional limitations. *Rostker* v. *Goldberg*, 453 U.S. 57, 72-74 (1981); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966). Deference is especially warranted here, because Congress specifically considered the constitutionality of equal access for students younger than those of college age. See *Rostker*, 453 U.S. at 64. See, *e.g.*, note 56, *supra*; S. Rep. No. 357, *supra*, at 6-9, 23, 35-36; H.R. Rep. No. 710, *supra*, at 3-4; see generally S. Rep. No. 357, *supra*, at 21-36.

In so concluding, Congress broke no new ground. This Court has repeatedly assumed, perhaps because of the dangers of assuming the opposite, that students have the requisite maturity to understand bedrock rights of free speech. See *Tinker*, *supra*; *Barnette*, *supra*; cf. *Pico*, *supra*. Although the Court has recognized that students below college age may be less able to distinguish government endorsement of religion from nonendorsement (see, *e.g.*, *Grand Rapids*, 473 U.S. at 383), the Court has never suppressed student free speech in order to clarify the difference. To the contrary, its "sponsorship" decisions have restrained *state* actions encouraging religious belief.[57] And, those decisions have all involved ele-

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[57] See, *e.g.*, *Grand Rapids*, *supra* (teaching by public school employees on parochial school grounds created appearance of connection between state and religion); *Abington Sch. Dist.*, *supra* (re-

mentary school, as well as secondary school, students.[58] The challenge to the constitutionality of the Act as applied at Westside High School can involve only students in grades 9 and above.[59]

A conclusion contrary to that reached by Congress and indicated by the previous decisions of this Court would be both remarkable and sobering. If students cannot understand that a State does not endorse everything it does not censor, they likewise will not understand that principle's corollary. They will perceive that what a State does censor—here religious speech—it must disapprove. In fact, the latter message—that the State is hostile to religion—would seem to be especially probable: while censorship typically does convey disapproval in American society, our First Amendment tradition generally explains the reasons for tolerance in "open forums." See p. 40, *supra* (describing congressional findings that students reasonably perceive State hostility towards religion); cf. *Wallace* v. *Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment) (noting that evaluation of message sent by government action must assume receiving individual's knowledge of First Amendment principle of free exercise). Exclusion of religion, and the message it conveys, would itself contravene the Establishment Clause, by sending the clear message that the State favors irreligion.

Experience has demonstrated that rigid application of formulaic tests cannot satisfactorily resolve the deli-

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quired prayer); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (same); *McCollum*, *supra* (release time program); cf. *Stone* v. *Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments, no possible "secular purpose").

[58] See *Grand Rapids*, 473 U.S. at 376 n.1; *Abington Sch. Dist.*, 374 U.S. at 205, 211 & n.4; *Engel*, 370 U.S. at 422; *McCollum*, 333 U.S. at 207-208; cf. *Stone* v. *Graham*, 449 U.S. 39, 39 & n.1 (1980).

[59] Under Nebraska law, "elementary school" includes grades 1-8; "high school" includes grades 9-12. Neb. Rev. Stat. § 79-101(4) and (5) (1987). At the time this suit was filed, Westside included grades 10 through 12. As of 1987-1988, 9th graders apparently enrolled at Westside. Tr. 602.

cate issues raised by the Establishment Clause. Thus, as Congress specifically concluded, it was the application of mechanical Establishment Clause jurisprudence in the lower courts that misled school boards to suppress free religious speech. And, this Court has departed from adherence to the tripartite test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), when its rigid application may well have led to a result plainly at odds with the intentions of the Framers. See *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (declining to apply *Lemon* test to issue of constitutionality of state legislative chaplaincy). In addition, the *Lemon* test has generated results that often obfuscate as much as they illuminate proper action under the Establishment Clause.[60] Especially when the *Lemon* test is divorced from the context in which it was spawned—financial aid to highly sectarian institutions—it sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people. Nevertheless, because the Equal Access Act so directly serves the same open forum goal as the Establishment Clause itself, it is hardly surprising that the Act clearly withstands scrutiny even under *Lemon*.[61]

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[60] Compare *Meek*, 421 U.S. at 367-371 (state employees may not provide remedial and accelerated instruction, guidance counseling and testing, speech and hearing services in nonpublic schools), with *Wolman* v. *Walter*, 433 U.S. 229, 241-248 (1977) (state employees may provide speech and hearing diagnostic testing (where these provisions of statute severable) within sectarian school; guidance, remedial, and therapeutic services may be provided in mobile unit off site of religious school). Commentators have likewise noted the confusion. See Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 17-20 (1979); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 268-270 (1987).

[61] The Act plainly has a "secular legislative purpose." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). As described previously, the Act was intended to and expressly does protect speech from discrimination on the basis not only of religious but "political, philosophical, or other content" as well. See pp. 16, 19, 31-32, *supra*. The Act does not have the principal or primary effect of promoting

B. Congress's decision to require equal access to an open forum when a school permits one or more noncurricular student groups to meet does not establish religion

The decision of Congress to trigger the non-discrimination safeguards of the Equal Access Act whenever a secondary school (1) receives federal funds and (2) affords an opportunity for "one or more noncurriculum related student groups to meet" (20 U.S.C. 4071(b)) does not alter the foregoing analysis. This Court's decisions make clear that a limited open forum for purposes of constitutional analysis can be established "'by policy

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religion (*Lemon*, 403 U.S. at 612) for the reasons more fully developed above (see pp. 32-42, *supra*). Individuals engaged in religious speech receive only the "incidental benefits" bestowed on a wide range of speakers. In addition, there is no appearance of sponsorship because the Act clearly safeguards a neutral forum in which individuals or groups are free to speak as individuals, not as groups affiliated with the State.

Finally, the Act does not pose any danger of excessive entanglement between the state and religion. *Lemon*, 403 U.S. at 613. The only relationship created by the Act is one of oversight. School employees may attend student meetings only to monitor them for orderliness and compliance with school regulations and Act requirements. See 20 U.S.C. 4071(c)(3) and 4071(f). Such involvement is like that provided by police and fire departments to many religious groups, both in their activities on public property and for their security on private property (see *Widmar*, 454 U.S. at 274-275); it does not approach the "comprehensive, discriminating, and continuing state surveillance" that this Court has found excessively to entangle Church and State. *Lemon*, 403 U.S. at 619. See, *e.g.*, *ibid.* (state funding of parochial school employees to teach secular subjects without religious influence); *Aguilar*, *supra* (state administration of federal funds to pay public employees to provide secular services in parochial schools); *Meek*, *supra* (guidance, testing, and other services offered by public employees on parochial school grounds).

Indeed, as the Court noted in *Widmar*, a school risks greater entanglement in attempting to distinguish and exclude religious speech from an open forum than it does in neutrally allowing free speech by students. 454 U.S. at 272 n.11. The Act thus reduces existing and potential entanglement by ensuring that school officials not engage in selection and apparent endorsement of *some* religious speech.

or by practice.'" *Hazelwood*, 484 U.S. at 270 (emphasis added) (quoting *Perry Educ. Ass'n*, 460 U.S. at 47). See also *Perry*, 460 U.S. at 45 (public forum can be created "by long tradition or by government fiat"). The effect of the Act is to require secondary schools, as a condition of acceptance of federal financial assistance, to acknowledge a limited open forum as their policy if they permit one or more noncurriculum groups to meet. Under *Widmar* and this Court's other precedents, a school with such a policy does not violate the Establishment Clause if it accords religious groups equal access.

Much of the argument of petitioners and their amici is devoted to attempting to establish that Westside in fact did not have a limited public forum under the criteria set forth by this Court in *Widmar* and *Perry*.[62] The argument is unavailing. Given the wide range of student-initiated clubs at Westside, the court of appeals correctly concluded that "[t]he facts in *Widmar* are quite similar to the facts in the instant case." Pet. App. A15.

More fundamentally, however, a determination of whether Westside established a limited public forum in the constitutional sense on the basis of its previous actions or published statements is beside the point. As explained above, Westside afforded an "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b). As a condition of Westside's acceptance of federal funds, therefore, the Act requires Westside to adopt a limited open forum "by policy," complete with equal access.

There can be no serious doubt that a limited open forum can be established as a matter of policy, quite apart from any consideration of actual practice. Any other rule would, for example, mean that a newly opened school could not have a limited open forum, because there would have been no practice at the school. The Equal Access Act simply requires that such a policy be adopted at

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[62] Petitioners state that "[s]ince no constitutional limited public forum exists at WHS, none should exist for purposes of the Act either." Pet. Br. 60 n.24.

secondary schools meeting the prerequisites of the Act. Given such a policy, *Widmar* makes clear that the requirements of equal access and non-discrimination in the Act do not contravene the Establishment Clause and, indeed, are mandated by the Free Speech Clause.

We recognize that application of the plain language of the Act may, in particular cases, result in the imposition of equal access and non-discrimination requirements at secondary schools that did not previously have a limited public forum in the constitutional sense. But the practice that develops as a result of application of the Act and this policy will depend entirely on the desires and actions of the students. What is clear is that there will be at least one other noncurriculum related club—the trigger in the Act. Whether the students establish ten, twenty, or one hundred others will be independent of the school, as will any decision to establish any club to engage in speech on religious subjects. See *Mueller*, 463 U.S. at 399 (upholding tax deduction for school expenses, including parochial school expenses, because "[w]here * * * aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of state approval,' *Widmar*, *supra*, at 274, can be deemed to have been conferred on any particular religion, or on religion generally").

In *Widmar*, the Court concluded that the open forum at issue in that case would not have the primary effect of advancing religion, "[a]t least in the absence of empirical evidence that religious groups will dominate [the] open forum." 454 U.S. at 275. Later, however, in *Mueller*, the Court questioned the utility of any such empirical evidence, stating that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401. Here, in any event, the challenge is to the statute as applied. There are already a number of other, noncurriculum related clubs at Westside. There is no indication that a religious club will so dominate the forum that students will not be able

to recognize that the club is not endorsed by the school. To the contrary, the district court found that "[u]nder the facts of this case, * * * the proposed format protects against the conferring of an imprimatur of school approval." Pet. App. B11 n.1.

C. The Establishment Clause does not operate to suppress the activity of private individuals

At bottom, petitioners' complaint is in large part a complaint about the actions of individual students. We agree that there is a powerful element in peer pressure. It is coercive; but it is not the coercion of the State. It is, in fact, the coercion that occurs among participants in "the pluralistic, often contentious society in which they will soon be adult members." That in no small part is the natural result of liberty—liberty to think, to speak, to debate and to persuade.

The Establishment Clause, however, operates only against the State. It "mean[s] that the *government* may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." *County of Allegheny*, 109 S. Ct. at 3099 (footnotes omitted; emphasis added). It focuses on the message the *government* sends. *Id.* at 3101. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment). It may not be used, however, "as a sword to justify repression of religion or its adherents from any aspects of public life." *Ibid.*

The First Amendment requires that actions establishing religion by the State, which are prohibited by the Establishment Clause, be distinguished from religious expression and participation by individuals, which are protected by the Free Speech and Free Exercise Clauses. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting). A public forum,

once created, becomes a place for individual expression—a basic human liberty. The Establishment Clause cannot be used to police it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V. 1987), provides as follows:

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§ 4072. Definitions

As used in this subchapter—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

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